IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.143 OF 2006
IN
NOTICE NO.N/121 OF 2005

Re : Ved Prakash Agarwal ..Judgment Debtor.
Ex-parte :
M/s. Rama Petrochemicals Ltd. ..Judgment Creditors.

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Mr. Virag Tulzapurkar, Senior Advocate with Mr. Venkatesh Dhond with Mr. Vishal Maheshwari i/b M/s. Negandhi, Shah & Himayatullah for the Judgment Debtor.
Mr. Kishore Jain i/b M/s. Bilawala & Co. for Judgment Creditors.

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CORAM: DR. D.Y. CHANDRACHUD, J.

7th November, 2006.

P.C. :

1. An Insolvency Notice has been issued based on a decree dated 22nd April, 2002 passed by this Court in Summary Suit 6294 of 1999. The suit came to be decreed in the amount of Rs.43.05 lacs together with future interest at the rate of 18% per annum from 25th October, 1999. The decree was confirmed by the Division Bench on 21st April, 2004. The Special Leave Petition was dismissed as withdrawn. The suit against the Applicant was in his capacity as a guarantor. The Applicant was the Managing Director of a company by the name of Prakash Industries Limited.

2. In support of the Motion, it has been submitted that the Applicant neither carries on any business within the jurisdiction of this Court nor does he reside therein. Section 11 of the Presidency Towns Insolvency Act, 1909 provides that the Court shall not have jurisdiction to make an order of adjudication unless inter alia the debtor within a year before the date of the presentation of the Insolvency Petition has ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the ordinary original civil jurisdiction of the Court. In the present case, it has been submitted that the condition precedent to the exercise of jurisdiction under Section 5(b) is not fulfilled and that consequently, the insolvency notice ought to have been set aside.

3. Section 9(5) of the Presidency Towns Insolvency Act, 1909 specifies the grounds on which any person who is served with an insolvency notice may apply to the Court for setting aside the notice. The question as to whether an objection to the jurisdiction of the Court can be taken in a Motion for setting aside the insolvency notice stands concluded by a judgment of the

Division Bench of this Court dated 17th September, 1993 in **Ramanlal Khanna v. Industrial Finance Corporation of India Ltd**. (Appeal 683 of 1993 in Notice of Motion 23 of 1993 in N/114 of 1992 and connected matters). A Division Bench of this Court, while considering the issue held that the substantive provisions contained in sub section (5) of Section 9 must prevail over the rules. The Division Bench held as follows :

> "Sub section (5) of Section 9 in terms provides that insolvency notice can be challenged only on limited grounds enumerated therein."

Again in paragraph 7 of the judgment, the Division Bench specifically dealt with the objection to the jurisdiction of the Court and held that, that issue could only be determined in a petition for adjudication under Section 11 of the Act. More recently on a reference to the Division Bench, the same issue was revisited in a judgment of the Court in **Hemant M. Nabar v. Farohar & Co.**[1] A Division Bench of this Court, while following the earlier decision in **Ramanlal Khanna**'s case held that sub sections (2) and (5) of Section 9 constitute a self contained Code on the subject and that it is not permissible for the Court to evolve additional grounds of

1 2005(5) Bom. C.R. 234.

challenge to the insolvency notice. The reference was accordingly answered thus :

> "In our opinion the position of law as it stands today is that it is those grounds which are available under section 9(5) would be the grounds available to a debtor to seek setting aside or discharge of an insolvency notice."

4. On behalf of the Applicants reliance was, however, placed on a judgment of a learned Single Judge of the Madras High Court in **T. J. Raju v. P. R. Neelakantan**[2] in which the view that was formulated was that an insolvency notice is a step in aid for the institution of an insolvency petition and that such a notice could not serve any purpose if the petitioning creditor was handicapped in filing the insolvency petition before the Court either by virtue of the debtor residing beyond the limits of the ordinary original civil jurisdiction of the Court or not carrying on business therein. The learned Single Judge of the Madras High Court was of the view that a lack of territorial jurisdiction would also have to be construed as a ground for setting aside the insolvency notice, though such a ground is not specifically ingrained in Section 9(5) of the Act. The view which has been taken by the Learned Single Judge of the Madras High Court cannot be

2 AIR 1991 MADRAS 24.

accepted for the simple reason that it would run contrary to both the judgments of the Division Benches of this Court to which the reference has been made earlier and which are binding. On behalf of the Applicants it was submitted that a dismissal of a Motion challenging an insolvency notice would enable a creditor to institute a petition for adjudication in any Court having jurisdiction within the meaning of Section 11, and that having regard to the quasi penal consequences that follow from an order of adjudication, the provisions of the Act must be construed strictly. There can be no dispute about the principle, enunciated in **State Bank of India v. Sohanlal Babulal Jain**[3] that provisions relating to insolvency have quasi penal consequences and that they must be construed strictly. Two Division Benches of this Court have, however, held that the only grounds which are available when an application for setting aside an insolvency notice is filed are those stipulated in Section 9(5) of the Act. **Ramanlal Khanna**'s case in fact specifically dealt with the question as to whether a challenge to the jurisdiction of the Court could be levelled at that stage and answered the question in the negative. In that view of the matter, in view of the binding judgments of two Division Benches of this

3 1997(1) Bom. C.R. 88.

Court, this Motion would have to be dismissed and is accordingly dismissed. In view of the position in law as it emerges from the judgment of the Division Bench, it is however necessary to clarify that no opinion is expressed by this Court at the present stage on whether a petition for adjudication would properly lie before this Court. The question of jurisdiction would fall for determination on a Petition for adjudication.

Stay refused.